No. 79-2026

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SALORIO, ROBERT COE and
JOHN D. McGARR, JR.,

Appellants,

v.

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE GLASER TO DISMISS

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Questions Presented

1. Is the remand order of the Supreme Court of New Jersey a final judgment within the meaning of 28 U.S.C. §1257 when it expressly finds the present record inadequate to decide the principal federal issue raised by appellant and remands the case for a plenary trial on that issue?

2. Is a substantial federal question presented by the decision of the Supreme Court of New Jersey that a plenary trial should be conducted to determine whether the New Jersey Emergency Transportation Tax violates the Privileges and Immunities Clause of Article IV of the United States Constitution?

3. Is a substantial federal question presented by the decision of the Supreme Court of New Jersey that the New Jersey Emergency Transportation Tax is consistent with the requirements of the Equal Protection Clause of the Fourteenth Amendment?

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On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEE GLASER TO DISMISS

The appellee Glaser hereby moves to dismiss the appeal pursuant to Rule 16(1)(a) and (b) on the grounds that the order of the Supreme Court of New Jersey sought to be appealed is not a "final judgment" within the meaning of 28 U.S.C. §1257 or, in the alternative, that the federal questions presented for review either were not expressly passed on by the Supreme Court of New Jersey or are not substantial.*

* In addition to the within motion, the appellee has filed a cross petition for writ of certiorari seeking review of certain determinations of the Supreme Court of New Jersey in this same action.

Statement of the Case

Located in the huge New York City metropolitan area, New Jersey has been aptly referred to as a "corridor state". Each working day hundreds of thousands of commuters traverse the Hudson River separating New Jersey from New York. The limited number of available river crossings and the vast number of interstate commuters cause interstate transportation problems which are more substantial than those in any other area.

Since they are not self-sustaining, the principal interstate transportation facilities, such as buses and trains, must be substantially financed by the State of New Jersey. The New Jersey tax structure relies very heavily upon real property taxes which are among the highest in the Nation. Since real property taxes ordinarily are paid only by residents, nonresidents who commute to New Jersey traditionally have not contributed substantially to State revenues even though they derive substantial benefits from the New Jersey transportation system. The undue reliance by New Jersey upon local real property taxes also has severely restricted the State's capacity to provide vital public services. See *Robinson* v. *Cahill,* 67 N.J. 333, 339 A.2d 193 (1975). One of the public services which has placed heavy stress upon the fiscal resources of the State has been the transportation of interstate commuters. See, *e.g., In re Central R.R.*, 485 F.2d 208 (3rd Cir. 1973) (en banc) *cert. den., Timpany* v. *New Jersey,* 414 U.S. 1131 (1974).

In 1961, the New Jersey Legislature took cognizance of this pressing interstate transportation problem in the New York-northern New Jersey transportation area. The legislative means devised to generate the additional revenue needed to maintain and improve transportation facilities

between New Jersey and New York was the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1, *et seq.*) (hereinafter referred to as "ETT") which is essentially a tax on individuals who use interstate transportation facilities. The imposition of the tax was expressly made contingent upon the annual certification by the New Jersey Commissioner of Transportation to the State Treasurer of the existence of a "critical transportation problem" in connection with transportation between this State and another state bordering thereon. N.J.S.A. 54:8A-5(c).

Significantly, all ETT revenues are paid into a special transportation fund. N.J.S.A. 54:8A-20. Other than the costs of administering the tax and of refunds to taxpayers, the ETT fund is used exclusively to finance projects and programs designed to alleviate transportation problems between New Jersey and New York (see Pa101 to Pa119).* The statute specifically provides that the ETT fund may not be used except upon a presentation to the Attorney General itemizing the purposes for which the funds will be used, and the transmittal of such itemization to the State Treasurer "with a certification by the Attorney General endorsed thereon that the purposes for which funds are therein proposed to be used are within the terms and intent of the act . . ." N.J.S.A. 54:8A-20(b)(2). If any of the moneys in the transportation fund are not used for one of the purposes specified in the Act, a taxpayer has the right to a refund or credit equal to his pro rata share of the fund. N.J.S.A. 54:8A-22.

When the ETT became effective, it was in practical effect applicable solely to New Jersey residents commuting

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* This notation refers to the appendix filed by the appellants with the Supreme Court of New Jersey.

to work in New York (Da20).* The ETT was imposed on individuals residing in either New Jersey or New York and deriving income in the other state. N.J.S.A. 54:8A-2. In addition, the New York Personal Income Tax was imposed on the income of New York residents and the New York income of New Jersey residents. The rates of the two taxes were similar. At that time both the New York Personal Income Tax (§640) and the New Jersey ETT (N.J.S.A. 54:8A-16(A)) provided for nonresident credits (Da21). The net result of these taxing and crediting provisions was that individuals living in New York or New Jersey paid a tax to the state in which they resided on their income derived from the other state.

The State of New York objected to this system of taxation of interstate commuters, and as early as June of 1961 then Governors Rockefeller and Meyner held discussions concerning possible changes in the operation of this system of taxation (Da50). Further discussions were held in December of 1961 between Governor Rockefeller and then Governor-elect Hughes (Da51). While these discussions continued, the New York State Legislature repealed §640 of the New York Personal Income Tax Law which had permitted New Jersey residents a credit for the ETT taxes paid to New Jersey (Ch. 2, N.Y. Laws of 1962 and Da21 and Da47). By this act New York also denied its residents their right to the ETT nonresident credit (which was based on reciprocal treatment of New Jersey residents by New York) and granted them a credit against their New York tax liability for the payments made to New Jersey under the ETT. The net result was to make New Jersey residents liable for both

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* This notation refers to the appendix filed by the appellee with the Supreme Court of New Jersey.

the New York Personal Income Tax and the ETT on New York—derived income and to make New York residents liable for only the ETT on their New Jersey—derived income (Da21 to Da22).

The controversy between New York and New Jersey continued thereafter, with New Jersey threatening to sue New York concerning the application of certain provisions of the New York tax law to New Jersey residents (Da53). The discussions to resolve the controversy eventually culminated in an accord between the two states (Da42 to Da47, Da53). The core of the accord was that New York would retain the full amount of New York income taxes imposed upon New Jersey residents, with New Jersey allowing a full credit for those payments, and that New Jersey would retain the full ETT taxes imposed upon New York residents, with New York allowing a full credit for those payments (Da47).

The terms of the accord between the states were announced by Governors Rockefeller and Hughes on May 6, 1962 in the following Executive Statement:

> "Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.
>
> "Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.

"Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

"In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect the taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.

"The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.

"The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will." (App. B at 44-45).

Following this executive action, the New Jersey Legislature enacted Chapter 70 of the Laws of 1962, which was made expressly retroactive to all taxable years beginning on or after January 1, 1961 (Da24). This provision affords a credit to New Jersey residents against the ETT for any income tax imposed by another "critical area State" (*i.e.*, New York). N.J.S.A. 54:8A-16(B). Thus, due to the retroactive amendment of the New York Personal Income Tax Law repealing the "nonresident" credit and the subsequent amendment of the ETT granting a credit to New Jersey residents for taxes paid to New York, the ETT is now paid by New York residents working in New Jersey rather than, as originally intended, New Jersey residents working in New York.

These arrangements between the two states have remained in effect for more than fifteen years. However, this action, seeking a declaration that the ETT is unconstitutional, was filed by three New York residents in June of 1977. After the appellee had filed two procedural motions, one of which was denied and the other of which was never ruled upon,* the matter was brought before the trial court on cross motions for summary judgment in December of 1977. At that time the appellants insisted upon the right to take the depositions of the persons whose affidavits had been submitted in support of the appellee's motion for summary judgment (Transcript of December 15, 1977 hearing, at T4-6 to T5-3). This resulted in the taking of more than 550 pages of depositions as well as the

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* The indication in the Jurisdictional Statement that the appellee has filed certain motions for purposes of delay is unwarranted and offensive. Each one of the motions referred to by appellants had a substantial basis in State law (see appellee's brief filed with the Supreme Court of New Jersey, at pp. 1-2, 38, 44-46) and was filed by the appellee because it was felt that his position on the merits would be furthered if the motion were granted.

introduction of hundreds of pages of exhibits in connection with those depositions (Pa50 to Pa100, Pa120 to Pa131). The matter was then brought back before the trial court, first in February and then in March 1978, at which time there was further controversy concerning the parameters of the record (Pa145 to Pa149, Da45 to Da59).

On October 24, 1978 the trial court issued a comprehensive opinion upholding the constitutionality of the ETT (App. B at 35-59). The trial court made a number of findings of fact which supported the constitutionality of the ETT, including findings that:

> "5. The determination by the administrative authorities in New Jersey of the existence of a 'transportation crisis' in addition to being presumptively accurate is justified by the facts and the Court finds that such a problem exists.
>
> "6. The purposes expressed in the statute for the utilization and allocation of the funds collected under the challenged tax . . . bear a direct relationship to the crisis referred to.
>
> "7. . . . [I]f the Act is administered in accordance with the express purposes, then in fact taxpayers, such as plaintiffs, will receive a direct benefit from the expenditure of the funds." (App. B at 52).

The court further found that ". . . the transportation problem is substantial and the ultimate impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems." (App. B at 55). Based upon these factual findings, the trial judge concluded that the appellants had failed to demonstrate that the ETT violates the United States Constitution.

The trial court also found that New York and New Jersey had entered into a reciprocal agreement, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV, pursuant to which the ETT and its companion legislation in New York had been enacted and remained in effect. In finding the existence of such a mutual undertaking between the states the trial court stated:

> "In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. New York accepted the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude.
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> "... [T]here is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states ..." (App. B at 56).

On direct appeal from the judgment of the trial court, the Supreme Court of New Jersey held in favor of the appellee on one issue, in favor of the appellants on two issues and it ordered a remand with respect to one critical element of the case. First, the court held that the case could be adjudicated without New York being joined as a party even though the complaint collaterally attacked a 1962 agreement between the States of New York and

New Jersey dealing with the allocation of the fiscal burdens of state government caused by interstate commuters (App. A at 4-8). Second, it held that this agreement was irrelevant to the question of the conformity of the ETT with the requirement of the Privileges and Immunities Clause of Article IV because the agreement was not entered into in conformity with the provisions of the Compact Clause (U.S. Const., Art. I, §10, cl. 3) (App. A at 27-31). Third, the court held that the ETT is consistent with the Equal Protection Clause of the Fourteenth Amendment (App. A at 31-35). Finally, the Supreme Court of New Jersey concluded that the trial court had acted improvidently in deciding the principal issue in the case on cross motions for summary judgment. It concluded that the question whether the ETT is properly designed to impose a fair share of the costs incurred by New Jersey in the operation of interstate transportation facilities upon nonresidents who directly benefit from those facilities is a factual question which should have been decided only after a plenary trial (App. A at 17-27). It therefore ordered a remand ". . . to permit a full exploration of the benefits and burdens to nonresidential commuters occasioned by State transportation programs and imposition of the ETT." (App. A at 26). In providing guidelines for further trial proceedings the Supreme Court of New Jersey said:

> "On remand, evidence should be introduced to enable the trial court to compare the transportation benefits New York residents receive and the tax contributions they are required to make. The data must therefore include statistics on annual state and local expenditures—identified by source—for commuter rail and bus services and for construction and maintenance of highways used by interstate

> commuters. Figures on the amount and application of ETT monies must also be presented. Commutation figures must be introduced for the years during which non-residents paid emergency transportation taxes." (App. A at 26-27).

The case is therefore now back before the trial court for the plenary trial on remand ordered by the Supreme Court of New Jersey.

ARGUMENT

POINT I

The appeal should be dismissed for lack of jurisdiction because an order remanding a case for plenary trial on the same federal issue which is the subject of the appeal is not a final judgment from which a party may appeal pursuant to 28 U.S.C. §1257.

As discussed in greater detail in the cross petition for a writ of certiorari, it was the position of the appellee before the Supreme Court of New Jersey and continues to be his position that the factual record initially developed before the trial court is sufficient to sustain the constitutionality of the ETT. However, acknowledgement must be given to the fact that the Supreme Court of New Jersey disagreed with this position and concluded that that record was insufficient to determine whether the ETT imposes on nonresidents only "their share of the transportation problem they cause or the benefits they receive." (App. A at 36). The court therefore concluded that a remand for the development of a full record was required before it could decide whether the ETT was compatible with the Privileges and Immunities Clause of

Article IV of the United States Constitution. This disposition requires acknowledgement that the remand order of the Supreme Court of New Jersey is not a "final judgment" subject to review by the Court pursuant to 28 U.S.C. §1257.

Review pursuant to 28 U.S.C. §1257 is only available with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." The Court has said that to satisfy this "finality" requirement, an order of a state court

> "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Railway Company* v. *Railroad Com'n of State of California,* 324 U.S. 548, 551 (1945).

There have been limited circumstances in which the Court has found the finality requirement to be satisfied even though parts of a case remain open for further proceedings in the state courts. See generally, *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 476-487 (1975). However, the firmly established threshold requirement for finding the existence of a final judgment for the purposes of 28 U.S.C. §1257 is that "the highest court of a State has finally determined the federal issue present in a particular case. . . ." *Id.* at 477. See also *Gospel Army* v. *Los Angeles,* 331 U.S. 543 (1947). Wright, Miller, Cooper & Gressman, *Federal Practice* and *Procedure Jurisdiction,* §4010, pp. 585-586 (1977).

The remand order of the Supreme Court of New Jersey clearly fails to satisfy this threshold requirement for a finding of finality. The principal issue in the case

is the conformity of the ETT with the requirements of the Privileges and Immunities Clause of Article IV of the United States Constitution. On this issue the Supreme Court of New Jersey has not yet reached a final determination. Rather it has simply said that the existing record is inadequate to reach a proper determination and it has remanded the case for a plenary trial. This means that if the court were to consider the constitutionality of the ETT at the present posture of the case it would not be reviewing a final determination of the State's highest court.* Therefore, the remand order

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*It is true that the Supreme Court of New Jersey has finally decided that the ETT does not violate the Equal Protection Clause of the Fourteenth Amendment. However, the Court has repeatedly declined to find the finality requirement satisfied when there has been an interlocutory decision as to one federal issue but a second federal issue remains open for decision at a later stage of the proceedings. As noted in *Cox Broadcasting Corporation* v. *Cohn, supra*:

> "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later. 'For in those cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem.' *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973)." 420 U.S. at 477, n. 6.

Similarly, the question whether a tax alleged to unfairly burden a non-resident violates the Equal Protection Clause is so closely related to the question whether it violates the Privileges and Immunities Clause of Article IV (see *Shaffer* v. *Carter*, 252 U.S. 37, 55-57 (1920); *Baldwin* v. *Montana Fish and Game Com'n*, 436 U.S. 371, 406, n.6 (1978) (Brennan, dissenting)) that the lack of finality of a disposition of the later issue also necessarily bars review of the former issue.

of the Supreme Court of New Jersey fails to satisfy the threshold requirement for a finding of finality.

Furthermore, even if this threshold defect could be overcome, review of the Supreme Court of New Jersey's remand order would be inconsistent with the policies intended to be served by the finality rule. Since the principal issue on which the appellants seek to appeal is precisely the same issue as the Supreme Court of New Jersey has remanded to the trial court, the practical effect of the appeal, assuming either that the State trial court is divested of jurisdiction (see *Hovey* v. *McDonald,* 109 U.S. 150, 157 (1883); 9 Moore's *Federal Practice,* ¶203.11, n. 1 (1980)) or that it chooses as a matter of sound judicial administration not to proceed with the remand pending action by this Court, would be to delay the proceedings on remand. The avoidance of such interruption of state trial court proceedings is one of the primary objectives of the finality rule. *Catlin* v. *United States,* 324 U.S. 229, 233-34 (1945); see also Note "The Finality Rule For Supreme Court Review of State Court Orders", 91 Harv. L. Rev. 1004, 1006 (1978). Another possible consequence of now entertaining an appeal from the Supreme Court of New Jersey's remand order is that the Court would affirm that disposition and then be called upon to review the case again after proceedings had been completed before the trial court and a final decision had been made by the Supreme Court of New Jersey. The possible need for such multiple appeals would be inconsistent with a further purpose of the finality rule, the avoidance of piecemeal appellate review. *United States* v. *MacDonald,* 435 U.S. 850, 853 (1978); *DiBella* v. *United States,* 369 U.S. 121 (1962).

There also is a serious procedural issue which would be raised by an appeal from the Supreme Court of New

Jersey's remand order, at least if the Court considered the constitutionality of the ETT as distinguished from simply the propriety of the remand. As recognized both by the trial court and the Supreme Court of New Jersey, the issues in this case are essentially factual in nature. With respect to these issues the trial court made a number of critical findings of fact. For example, it found that ". . . the transportation problem [for commuters between New York and New Jersey] is substantial and the ultimate impact of the tax upon residents and nonresidents bears a close relation to the challenge of correcting the traffic and commuting problems." (App. B at 55). The essential position of the appellee in the appeal to the Supreme Court of New Jersey was that this and other similar findings were supported by sufficient credible evidence in the record and that such findings provide an adequate basis for upholding the constitutionality of the ETT. The Supreme Court of New Jersey did not set aside any specific findings of the trial court nor did it make any findings of its own but rather it stated broadly that ". . . a ruling on the constitutionality of the ETT cannot be made on the present record." (App. A at 35). Therefore, if probable jurisdiction were noted one initial question would be whether any weight should be accorded to the factual findings of the trial court. Furthermore, if the Supreme Court of New Jersey's remand order were read as requiring those findings to be ignored, the Court would have to address the further question whether it should make its own findings of fact based upon a record found to be inadequate by the Supreme Court of New Jersey. These uncertainties concerning the status of the present record are a further reason why interlocutory review would not be appropriate even if the Supreme Court of New Jersey's remand order satisfied the threshold re-

quirement of being a final determination of the federal issue on which review is sought.*

In short, this case is no different from numerous other cases brought each year in the state courts challenging the constitutionality of state legislation or administrative actions.** It is not at all uncommon for the attacking party to file a motion for judgment on the pleadings or for summary judgment which, if well grounded, would

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* The uncertainty concerning the status of the record developed before the trial court and the findings made thereon by the trial court is also the reason that the appellee feels review of the case in its present procedural posture would be prejudicial. That record and those findings were critical to the appellee's defense of the ETT before the Supreme Court of New Jersey. The further record and findings now directed to be made by the Supreme Court's order of remand will be equally critical in any subsequent proceedings which might be taken either to the Supreme Court of New Jersey or to this Court. In other words, the record and clear-cut findings based on that record are too important to a proper decision for this case to be reviewed in its present procedural posture.

** The appellants in effect argue that the requirements of 28 U.S.C. §1257 should be ignored because the time required to complete the remand ordered by the Supreme Court of New Jersey will cause irreparable harm. However, even if such harm could be shown it would not justify disregarding the minimal finality requirement of §1257 that the federal question presented for review actually has been decided by the State's highest court. In any event, the claims of harm postulated in the Jurisdictional Statement are fabricated. The three appellants (this is not a class action) are New York residents who receive credit from New York for the full amount of ETT taxes paid to New Jersey. As a result, the appellants suffer no tangible harm from the ETT. Therefore, it is sheer fancy to suggest that appellants' freedom to travel or to practice their occupations is in any way inhibited by the ETT. In short, there is no special consideration raised by this case warranting consideration of a departure from compliance with clear-cut finality requirements.

bring the case to a speedy conclusion. It is also not at all uncommon for such motions to be denied or, if granted, to be reversed by a state appellate court, with the consequent necessity for a plenary trial. Any party who has sought summary disposition of a constitutional claim—and believes it should have been so treated—may argue that that claim "involves important federal rights which require immediate vindication . . ." and that "[r]eversal of the state court on the federal issue would preclude any further litigation. . . ." (Jurisdictional Statement, p. 15). However, 28 U.S.C. §1257, no matter how broadly construed, represents a firm congressional mandate that such an open-ended avenue for review of interlocutory rulings of state courts should not be available. Respect for that mandate requires that this appeal be dismissed for lack of jurisdiction.

POINT II

No substantial federal question is presented by a decision of the Supreme Court of New Jersey which remands a constitutional challenge to a state taxing statute for a plenary trial.

At the outset, it is important to re-emphasize that the decision of the Supreme Court of New Jersey which appellants seek to appeal is an order remanding the case for a plenary trial. Therefore, the question is not whether the conformity of the ETT with the Privileges and Immunities Clause of Article IV would present a substantial constitutional question but rather whether the decision of the Supreme Court of New Jersey that a plenary trial should be held presents a substantial constitutional question.

Although the appellee takes the position that the factual record initially developed before the trial court is sufficient to sustain the constitutionality of the ETT, it cannot reasonably be argued that the remand ordered by the Supreme Court of New Jersey is frivolous or capricious. On the contrary, it must be acknowledged that the Court has frequently stressed the importance of development of a full record in litigation in which it is claimed that taxes impose an undue burden upon nonresident parties. See, *e.g., Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429, 477 n.25. Indeed, in *Austin* v. *New Hampshire,* 420 U.S. 656 (1975), the very case upon which the appellants primarily rely in their attack upon the constitutionality of the ETT, the Court pointedly noted:

> ". . . [W]e find no support in the record for the assertion of the court below that the Commuters Income Tax creates no more than a 'practical equality' between residents and nonresidents when the taxes paid only by residents are taken into account. '[S]omething more is required than bald assertion' by the state court or by counsel here—to establish the validity of a taxing statute that on its face discriminates against nonresidents. *Mullaney* v. *Anderson,* 342 U.S. 415, 418 (1952)." 420 U.S. at 665 n.10.

In the face of this description of the state court proceeding in the case primarily relied upon by the appellants, it is easy to understand the sensitivity of the Supreme Court of New Jersey to the adequacy of the record on which it was asked to determine the constitutionality of the ETT.

It is true that there already is an extensive record in this case. However, that record consists primarily of depositions and exhibits presented to the trial court in a

summary proceeding. Furthermore, the appellants have not accepted the factual materials submitted by the appellee but rather have raised questions concerning the accuracy of certain statements made by the State's witness (Brief for Plaintiffs submitted to the Supreme Court of New Jersey, 29-30). The Supreme Court of New Jersey therefore may have concluded that a plenary trial was required to resolve such disputes. The court also apparently felt that there were relevant areas of factual inquiry which were not adequately covered by the existing record. Therefore, there was a reasonable basis for the Supreme Court of New Jersey's decision that the constitutionality of the ETT could be best judged on the basis of a record developed at a plenary trial, and its remand order requiring such a trial presents no substantial federal question warranting review by the Court.

The Supreme Court of New Jersey's rejection of appellants' arguments grounded on the Equal Protection Clause also fails to present any substantial constitutional question. Initially, it should be noted that claims by nonresidents of unfair or discriminatory taxation generally have been grounded upon the Privileges and Immunities Clause of Article IV rather than the Equal Protection Clause. *Austin* v. *New Hampshire, supra; Shaffer* v. *Carter,* 252 U.S. 37, 55-57 (1920); *Travellers' Insurance Company* v. *Connecticut,* 185 U.S. 364 (1902). Furthermore, there is no support for any assertion that the Equal Protection Clause affords any broader protection with respect to discrimination on the basis of nonresidency than does the Privileges and Immunities Clause; on the contrary, the prevailing assumption is that the protection it affords is narrower. *Cf. Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959). Therefore, even accepting appellants' view of the finality rule, it is clear that the arguments now advanced under the banner of the Equal Protection Clause

will be fully preserved for later presentation on the basis of the Privileges and Immunities Clause.

In any event, the appellants' equal protection argument is lacking in substance. The Court has recognized that the State may classify the subjects of taxation for differing treatment upon any basis which bears a rational relation to a legitimate end of government. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio, Inc.* v. *Bowers, supra.* Furthermore, this broad power of the Legislature to structure a state's tax system is not constricted simply because the attacking party happens to be a nonresident. *General American Tank Car Corp.* v. *Day*, 270 U.S. 367 (1926); *Shaffer* v. *Carter, supra; Travellers' Insurance Company* v. *Connecticut, supra; cf. Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Therefore, the appellants' challenge to the ETT under the Equal Protection Clause must be rejected if there is any rational basis for the imposition of the tax.

There can be no serious doubt but that such a rational basis exists for the imposition of the ETT. As observed by the Supreme Court of New Jersey:

> "New York residents who commute to New Jersey contribute significantly to the excessive demands placed on New Jersey's transportation facilities in the New York-New Jersey area. It is certainly conceivable that New Jersey residents are called upon to pay their fair share of transportation costs by the operation of other state and local taxes. Mathematical equality of impact is not required." (App. A at 34).

Finally, it should be reiterated that even if appellants were correct in their assertion that a greater showing is required to establish a "rational basis" for the imposition

of the ETT, the remand ordered by the Supreme Court of New Jersey will provide a more than adequate opportunity for further development of the record. Therefore, any review of the validity of the ETT, whether grounded on the Privileges and Immunities Clause or the Equal Protection Clause, should be postponed until that remand is completed.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of jurisdiction because the remand order of the Supreme Court of New Jersey is not a final judgment within the meaning of 28 U.S.C. §1257. In the alternative, the appeal should be dismissed for failure to present a substantial federal question.

Respectfully submitted,

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